s.103(3). The Shorter Oxford English Dictionary defined 'school' to include 'universities in general'. As a consequence Brady was still eligible for the allowance during the absence of her son to attend university.

Formal decision

The AAT affirmed the decision of the SSAT. The AAT also found that Brady was qualified to receive the child disability allowance under the 1947 Act and then under the *Social Security Act* 1991 until 19 March 1992.

[B.S.]

Disability support pension: first qualified overseas

CHRISTIAN and SECRETARY TO DSS

(No. 8552)

Decided: 18 February 1993 by P.W. Johnston.

Allen Christian came to Australia from New Zealand in June 1985. He worked in Australia until November 1988, although he suffered an injury to his lumbar spine in February 1986.

In November 1988, Christian travelled to the United Kingdom, taking his 2 children and his personal effects. Christian worked in the United Kingdom in a number of advisory or supervisory jobs until January 1992, when he injured his neck in a motor accident. In March 1992, Christian was granted a disability living allowance by the United Kingdom DSS.

In April 1992, Christian returned to Australia and lodged a claim for disability support pension (DSP). The DSS rejected his claim. The SSAT affirmed the DSS decision. Christian appealed to the AAT.

The legislation

Section 94(1) of the *Social Security Act* 1991 sets out the qualifications for DSP:

- A person must have a physical, intellectual or psychiatric impairment of 20% or more under the impairment tables: s.94(1)(a) and (b).
- The person must have continuing inability to work: s.94(1)(c).
- The person must have turned 16: s.94(1)(d).
- The person must either be an Australian resident at the time when he or she first met the impairment and continuing inability to work requirements or have 10 years qualifying Australian residence: s.94(1)(e).

Overseas resident's inability to work in Australia

The DSS conceded that Christian had a sufficient level of impairment and had a continuing inability to work within s.94(1)(a), (b) and (c).

However the DSS submitted that Christian had first met the impairment and continuing inability to work requirements while he was resident in the United Kingdom. Christian argued that he had met those requirements during his earlier period of Australian residence, between 1986 and 1988.

The AAT accepted the DSS submission and decided that Cgristian did not qualify for DSP. In the course of doing so, the AAT made the following points.

1. In applying s.94(1)(e)(i) and deciding when a person first met the impairment and continuing inability to work requirements, it was necessary to form:

> 'a contemporary opinion based on events that have occurred in the past, including situations (such as whether someone incurred a continuing inability to work) that have prevailed prior to [the introduction of DSP]'

(Reasons, para. 17)

2. A person's continuing inability to work was to be judged by reference to 'work that exists in Australia': s.94(5)(b). When considering the time when a person, who had been resident outside Australia, first developed a continuing inability to work within s.94(1)(c), it was necessary to ask a hypothetical question: when would the person:

> 'have been prevented from engaging in the person's usual kind of work for the requisite hours had that person been resident in Australia, for a period of at least two years following the point in time at which the inability to work reached that degree of incapacity'?

(Reasons, para. 21)

3. A person would be 'prevented' from engaging in work where the person was hindered from undertaking work and the hindrance was 'substantial in the sense of confining a person to no more than 30 hours a week': Reasons, para. 26.

4. The term "usual work" in s. 94(2)(a)(i) 'should be approached in a broad manner in terms of the kind of work one normally performs': Reasons, para. 29.

5. A person's continuing inability to work was to be determined as a matter of fact: if the person did continue to work for a substantial number of hours each week, despite his impairment, he could not be said to have a continuing inability to work. The fact that this was made possible by a sympathetic employer did not prevent this conclusion: 'his fortune in having an accommodating employer does not affect the position': Reasons, para. 31.

The AAT concluded that Christian had first developed a continuing inability to work while resident in the United Kingdom. He was not, at that time, an Australian resident. As he did not have 10 years' qualifying Australian residence, he could not satisfy s.94(1)(e) and did not qualify for DSP.

Formal decision

The AAT affirmed the decision under review.

[P.H.]

Compensation: judgment verdict

SECRETARY TO DSS and MESSENGER

(No. 8544)

Decided: 19 February 1993 by B.A. Barbour.

The Department of Social Security (DSS) asked the AAT to review a decision of the SSAT which had set aside a DSS decision on the appropriate preclusion period to be imposed on Messenger.

Messenger had been injured in a motor cycle accident on 3 November 1988. On 16 September 1991, a judgment was made in his favour for the sum of $168,422 which was reduced by 15% for contributory negligence, making a total of $137,565. Of this amount, $116,930.25 was agreed to be in respect of economic loss, both past and future. The DSS had treated this sum as

the compensation part of the settlement, under s.17(3)(b) of the *Social Security Act* 1991 and had calculated a preclusion period pursuant to s.1165 of the Act from 3 November 1988 to 7 October 1992. However, the SSAT had set aside that decision and remitted the matter to the Secretary for recalculation on the basis that the compensation part of the lump sum was 50% of $137,565.

The Department argued in the AAT that the SSAT had been incorrect in using the 50% rule as there had been a verdict after a hearing and not a consent order. On that basis, the correct provision to apply was s.17(3)(b). Moreover, the Department contended that there were no circumstances sufficiently special to warrant the use by the Secretary of the Secretary's power under s.1184 to treat the compensation payments as not having been made.

The AAT did not agree with the SSAT that Messenger's claim was determined by way of a 'consent verdict . . . i.e. the matter was settled'. The disposition by judgment had been confirmed by Messenger's solicitor in a discussion with the Tribunal.

The AAT explained that Messenger and his wife were both somewhat confused by the events that had occurred: for example, Mrs Messenger had stated at the SSAT hearing that the matter had been determined by consent verdict but she explained that she had understood this to mean a decision of the court.

As the Tribunal found that the matter was determined by a verdict, it was held that s.17(3)(b) applied so as to make the part of the payment that, is in the opinion of the Secretary, in respect of lost earnings, the compensation part of the lump sum payment. The AAT agreed with the Department that the figure of $116,930.25 was the appropriate sum for past and future economic loss. On that basis the AAT agreed with the calculation of the preclusion period and found that there was no evidence of special circumstances to justify the exercise of the discretion under s.1184.

Formal decision

The AAT set aside the SSAT decision and affirmed the decision of the delegate to calculate the preclusion period on the basis that $116,930.25 was the compensation part of the lump sum.

[R.G.]

Compensation: special circumstances

SECRETARY TO DSS and VXY

(No. 8559)

Decided: 3 March 1993 by J.R. Dwyer, L.S. Rodopoulos and C. Barker.

In December 1991, VXY settled a claim for compensation, and lodged a claim for disability support pension (DSP). The DSS conceded that VXY was 'manifestly eligible DSP' on 23 December, but then decided on 17 February 1992 that because VXY had received a lump sum of $140,000, he would be precluded from receiving DSP for 121 weeks from 20 December 1991. When VXY requested review of that decision by the SSAT, it was found that special circumstances existed and that DSP should be paid to VXY from the date of the SSAT decision. The DSS requested review of that decision by the AAT.

At the AAT hearing VXY applied for a suppression order preventing disclosure of his name and all evidence before the AAT which could assist in identifying him. An order to that effect was made, and the AAT identified the respondent by the initials 'VXY'.

Stay proceedings

The DSS lodged an application requesting that the AAT stay the operation of the SSAT decision. This application was refused by the AAT, which meant that VXY continued to receive payments of DSP until the further hearing by the AAT. VXY was warned that if the AAT were to decide that no special circumstances existed, he might have to repay all DSP payments made to him.

The facts

VXY ceased work in January 1990 and received weekly payments of workers' compensation. In June 1990 VXY developed a psychotic condition, which it was alleged, was related to his work caused condition. VXY was hospitalised on two occasions for psychiatric treatment. He requested review of his employer's decision to discontinue weekly payments of compensation, and this was heard on 2 December 1991. VXY was represented by a barrister and, after negotiations, a settlement offer was made. A lump sum of $140,000 was offered on the basis that VXY waived any further right to weekly payments and medical expenses. Because of his illness, VXY's son and wife had to decide whether to accept the offer. The strain of fighting the case would affect VXY's health badly according to his psychiatrist.

VXY's son wished to ensure that his father would continue to have an income if he accepted the offer, so approached the DSS for advice. Neither his barrister nor his solicitor advised VXY or his son that the lump sum would affect VXY's entitlement to social security payments. The son attended the DSS on 4 and 9 December 1991. He then agreed to accept the offer of settlement and an order to that effect was made on 19 December 1991.

VXY's son purchased the current family home in his parents' names in late March 1992 for $267,000. VXY and his wife owned an unencumbered block of land valued at $70,000, which was for sale, and have $5000 in the bank. Before DSP was paid to VXY, the family lived on the son's unemployment benefit which was paid at the single rate. The money in the bank was saved whilst VXY was receiving DSP.

The law

VXY did not dispute that the DSS had correctly calculated the preclusion period at 121 weeks, and that this period should run from 20 December 1991 according to s.1165 of the *Social Security Act* 1991. However, VXY submitted that pursuant to s.1184 of the Act, the Secretary to the DSS should consider the whole or part of the compensation payment as not having been made in the special circumstances of the case.

The AAT referred to Federal Court and AAT decisions which had considered the concept of special circumstances (*Secretary, DSS v Smith*, (1991) 62 *SSR* 876, *Re Krzywak and Secretary, DSS* (1988) 45 *SSR* 580). To decide whether special circumstances existed in this case, the AAT considered the following matters:

Incorrect advice

VXY's son told the AAT that he was incorrectly advised by the DSS on two occasions. On 3 December 1991 the son went to his local DSS office for information. He told an officer that his father was considering accepting a lump sum of $140,000, and asked if this would affect payment of the DSP. He was told that it would not. At the AAT hearing, the DSS presented a memorandum from the relevant office manager stating that no-one could remember speaking to VXY's son, but